

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

GLOBAL CONTACT SERVICES, INC.,)	
Employer)	
)	
and)	
)	
LOCAL 621, UNITED CONSTRUCTION)	
TRADES & INDUSTRIAL EMPLOYEES)	
Petitioner)	
)	
and)	Case No. 29-RC-134071
)	
TRANSPORT WORKERS UNION)	
LOCAL 100, AFL-CIO)	
Intervenor)	
)	
and)	
)	
LOCAL 322, UNITED WORKERS OF)	
AMERICA)	
Intervenor)	

EMPLOYER'S BRIEF IN SUPPORT OF EXCEPTIONS TO
THE HEARING OFFICER'S REPORT ON OBJECTIONS

I. INTRODUCTION

As established below, there is clear witness testimony that Transport Workers Union Local 100 ("Local 100") destroyed the laboratory conditions required by the Board for a free and fair election. Local 100's preelection conduct consisted of promises of payment and actual payment of substantial cash benefits to employees in exchange for their vote and commitment to campaign on behalf of Local 100. Notwithstanding Local 100's egregious conduct, a Region 29 Hearing Officer recommended that Global Contact Services, Inc.'s ("GCS" or "Employer")

objections to the election be overruled. Because the nature of Local 100's conduct is so destructive of the laboratory conditions required by the Board for a free and fair election, the Board should reject the Hearing Officer's recommendations, set aside the election, and order the Regional Director to conduct a new election with appropriate safeguards to ensure a fair election.

II. PROCEDURAL HISTORY

On August 5, 2014, Local 621 United Construction Trades and Industrial Employees ("Local 621" "Petitioner") filed a petition in this case seeking to represent GCS's customer service representatives and travel service agents. Pursuant to a stipulated election agreement, the Regional Director for Region 29 scheduled the election, involving Local 621 and Intervenor unions Local 100 and Local 322 United Workers of America to take place over the course of four consecutive days from September 10 through 13, 2014. The tally of ballots showed that Local 100 received a majority of the valid votes cast.

On September 20, 2014, GCS filed its Objections to Union Conduct Affecting the Results of the Election. On October 22, 2014, the Regional Director issued his Report on Objections. The Regional Director directed a hearing be held regarding GCS's objections 1(a) and (b) concerning the conduct of Local 100 offering and providing GCS employees substantial monetary benefits to vote and campaign for Local 100.¹

On November 4, 2014, a hearing was conducted in Brooklyn, New York on Employer objections 1(a) and (b). Specifically, the objections at issue in the Hearing included the following:

1. During the critical period, up to and including election days, Transport Workers Union, Local 100 ("TWU Local 100") engaged in conduct that

¹ The Regional Director also overruled GCS's objection that Local 621 "offered to pay cash to an employee for his support in the campaign" because, in his opinion, GCS's had not "specifically alleged" that misconduct in its objections. GCS's earlier filed exceptions to this recommendation are currently pending before the Board.

destroyed the laboratory conditions necessary for a free and fair election by, but not limited to, the following:

- a. Providing GCS employees (“employees”) substantial monetary benefits to vote and campaign for TWU Local 100;
- b. promising employees a substantial cash benefit in exchange for their vote for TWU Local 100

On December 9, 2014 the Hearing Officer issued her Report on Objections (“Report”) recommending that the objections be overruled. GCS hereby files its Exceptions and this Brief in support thereof.

III. THE EXCEPTIONS

GCS takes the following exceptions to the Report:

1. The Employer files an exception to the findings and recommendations of the Hearing Officer in Objection No. 1(a) because they ignore the credible record evidence.
2. The Employer files an exception to the findings and recommendations of the Hearing Officer in Objection No. 1(b) because they ignore the credible record evidence.
3. The Employer files an exception to the Hearing Officer’s credibility findings.
4. The Employer files an exception to the Hearing Officer’s failure to draw an adverse inference regarding Local 100’s failure to call witnesses reasonably assumed to be favorably disposed toward Local 100.
5. The Employer files an exception to the Hearing Officer’s recommendations that a Certification of Representative be issued.

IV. HEARING OFFICER’S CREDIBILITY FINDINGS

In reaching her recommendation to overrule GCS’s objections, the Hearing Officer credited the testimony of Local 100 witnesses Sandra Lennon (“Lennon”), Leslie Foster (“Foster”), Hilda Davis (“Davis”), and Brenda Ray (“Ray”), over the testimony of GCS employee Eric Shuler (“Shuler”). The Hearing Officer found that Shuler’s testimony was “at

times internally inconsistent and inconsistent with the credible testimony of other witnesses.”
(Report at 11).

The Hearing Officer also credited Local 100’s witnesses over Shuler based on their blanket denials that they knew Shuler or spoke at all with him about Local 100 offers and actual payments to GCS employees for their vote and commitment to campaign on behalf of Local 100. The Hearing Officer failed to even acknowledge in her Report the stark internal inconsistencies in the testimony of each witness for Local 100. For the reasons discussed below, the Hearing Officers credibility findings are in error, and should be overruled.

A. The Hearing Officer’s Erred in Finding that Shuler’s Testimony was Internally Inconsistent

Contrary to the Hearing Officer’s finding that Shuler’s testimony was internally inconsistent, a careful review of Shuler’s testimony reveals that he was, in fact, consistent in his testimony. The Hearing Officer cited a single “example” where she erroneously found Shuler’s testimony to be internally inconsistent. Specifically, the Hearing Officer found:

Shuler’s testimony was internally inconsistent in connection with his conversation with employee Lennon... inasmuch as he initially indicated some discussion with Lennon about newer/younger employees receiving \$100 and other more senior employees receiving \$200 to \$300; but later Shuler testified that Lennon did not go into a breakdown of money or talk about the newer/younger people.

(Report at 11)

The record reveals that Shuler did not testify that Lennon made any such assertions about a monetary breakdown. In that respect, Shuler initially testified on direct examination as follows:

Q. And when you say that [Lennon] said let’s get this money, was there any other discussion about that?

A. Basically, she was, you know, saying that people was getting paid to vote [for Local 100]. ...

(Tr. at 27).

Shuler continued that “people that were more new there, like the younger people, they really didn’t matter to [Local 100] because you give them \$100 and they will vote, and other people they was giving them like \$200 or \$300.” (Tr. at 27). Shuler did not testify that Lennon spoke about this breakdown of Local 100 payments. In fact, when pressed about this on cross examination, Shuler clarified that he learned about the monetary breakdown during a subsequent conversation with coworker Davis, not from Lennon.

Cross examination:

A. [Hilda Davis] was saying about the younger people and that they were getting, the \$100, because they were just coming in. And the people that have been down for a while, they were getting more.

Q. This is what Hilda [Davis] said?

A. Yeah.

Q. All right. And you had kind of the same, almost identical conversation with Sandra [Lennon]. [Lennon] gave you the same, according to you, your testimony is that [Lennon] gave you the same number breakdown?

A. ...[Lennon] just said get this money... she didn’t give me about the younger people. I didn’t tell you that [Lennon] gave me about the younger people. That’s what you’re saying... Ms. Lennon didn’t ask me that.

(Tr. at 62)

B. The Hearing Officer Erred in Crediting Local 100's Witnesses Over Shuler

In crediting Local 100's witnesses over Shuler, the Hearing Officer also cited to the fact that at times "Shuler testified as to what was 'basically' said by employees Lennon, Foster, Davis and Ray." (Report at 11). While it is true that Shuler's testimony was often presented in a colloquial fashion consistent with the way he speaks, there can be no dispute that he was very detailed about the conversations he had with each of Local 100's witnesses, including where and approximately when the conversations took place; who was present during the conversations; and, what was said during the conversations.

As discussed more fully below, in the weeks leading up to the election, the above-mentioned individuals approached Shuler on multiple occasions to discuss the fact that Local 100 was paying employees to vote for and campaign on behalf of Local 100 and that Shuler should "get on board" with that.

(i) Shuler's conversation with Lennon

Shuler testified consistently, and in great detail, on direct and cross-examination about his conversation with GCS employee Lennon. Specifically, Shuler testified that about a week before the election, Lennon approached him by the side of the GCS facility while he was taking a break to have a cigarette. (Tr. 26, 56). Shuler also testified that Lennon told him that he needed to "get with" Local 100 and "get this money" because Local 100 was "hitting up"/ paying people for their votes. (Tr. at 27, 57). Shuler testified that he responded to Lennon that he was not interested and walked away. (Tr. at 27).

For her part, Lennon testified on direct examination by counsel for Local 100 that during the weeks leading up to the election Lennon did not have any conversations with Shuler at all. In fact, Lennon denied even knowing who Shuler was until the hearing:

Q. Do you know who Eric Shuler is?

A. I just know his name today. I've seen him several – a lot on the job, but
I've never had conversations with him."

(Tr. 111)

Then, on cross-examination Lennon changed her tune:

Q. Ms. Lennon, you testified that you've never spoken with Mr. Shuler?

A. No, I didn't – you're saying about the union. No. I spoke to him a couple
of times, but nothing about the union...

(Tr. 112)(emphasis added).

As her above testimony shows, Lennon was initially adamant that she (a) did not even know Shuler's name before the hearing, and (b) never spoke with him before the election. Then, literally within minutes, she changed her testimony and testified that she had indeed spoken with Shuler, just not about the unions.

The Board should reverse the Hearing Officer's decision to credit Lennon's testimony over Shuler. As set forth above, Shuler provided clear, direct and consistent testimony that Lennon told him Local 100 was paying employees. By contrast Lennon's testimony was patently self-contradictory and confused. The Board has long held that confused, inconsistent distorted testimony, such as that provided by Lennon, should be discredited and given no weight. See *Filene's Basement Store*, 299 NLRB 183 (1990) (discrediting witness whose testimony was inconsistent and confused); *Irving Tanning Co.* 273 NLRB 6 (1984) (internally inconsistent

testimony discredited); *Freeport Transp., Inc.*, 220 NLRB 833 (1974) ("self-contradictory" testimony discredited).

(ii) Shuler's conversation with Foster

Shuler testified consistently and, again, in detail on direct and cross-examination that soon after the above-described conversation with Lennon and prior to the election, he was approached by GCS employees Foster and Lennon in the employee breakroom on the 7th floor next to the refrigerator and microwave. (Tr. 28, 64). Shuler testified that during that conversation, about four or five other employees were sitting nearby at a table in the breakroom (Tr. at 29, 64).

Shuler further testified that Foster asked Shuler why he wasn't "getting down" with Local 100 to get money from Local 100 for his vote. (Tr. 28). Shuler responded as he had in the earlier conversation with Lennon that he was not interested in Local 100 and left the breakroom. (Tr. 28).

By contrast, and in lock-step with Lennon's blanket denials, Foster testified incredibly on direct examination that she had no idea who Shuler was before appearing to testify at the hearing:

Q. Do you know Eric Shuler?

A. Wasn't that the guy that was here earlier?

Q. I can't tell you.

A. Well, I know – yeah, I know of him. I don't know him, but we see each other at work.

(Tr. at 119,120)

Then predictably, and in again in lock step with Lennon, Foster testified that she had never spoken with Shuler about unions:

Q. Do you recall having any conversations with him as relates to unions during the September period at all prior to the election?

A. No.

(Tr. at 120)

However, as was true of Lennon, Foster did a 180 degree turn in her testimony on cross examination when pressed as to whether she ever had a conversation with Shuler, stating that she had actually spoken with him and Davis on the elevator:

Q. ...Did you ever have a conversation with Ms. Davis and Mr. Shuler?

A. No. It's maybe on the elevator, going home maybe, goodbye, we're fooling around, but we're not even on the same floor. We don't see each other like that.

(Tr. at 122)

As was the case with Lennon, Foster's initial denial of speaking with or even knowing Shuler at all prior to the hearing, quickly turned to an admission that she did in fact know him and that they had conversations on the elevator. She even discussed her frequent friendly banter with Shuler, often conversing and "fooling around" with Shuler. Clearly, Foster came to the hearing ready, as she did initially on direct examination, to deny ever speaking with Shuster or even knowing him. Foster's contradictory statements, like those of Lennon, on such basic issues such as whether she knew Shuler or ever spoke with him were not even addressed in the Report. As discussed above with respect to Lennon, and consistent with the above-cited Board precedent,

the Board should find that Foster's internally inconsistent testimony, is grounds for reversing the Hearing Officer's decision to credit Foster's testimony over that of Shuler.

(iii) Shuler's conversation with Davis

With respect to his conversation with Davis prior to the election, Shuler once again provided clear, consistent testimony. Specifically, Shuler testified that one morning about four or five days before the election, Davis approached him at his cubicle and asked "which way [he] was going with this union thing." (Tr. 30, 34). Shuler testified that Davis then mentioned she had been a member of Local 100 as a former First Transit employee and that in her experience Local 100 had been successful in getting terminated employees their jobs back within two or three months with back pay. (Tr. 32). Shuler continued that Davis stated to him that she had given a couple of employees money on behalf of Local 100 to vote for Local 100. (Tr. 33). Shuler then testified that Davis mentioned to him that Local 100 was paying younger employees about \$100 and more experienced employees about \$200 to \$300 to vote for it. (Tr. 62). Shuler testified that he responded to Davis as he had with Foster and Lennon, stating that he was not interested in Local 100. (Tr. 32, 33).

In contrast to Shuler's detailed, consistent testimony, Davis testified that **while she did have conversations with Shuler about Local 100**, she could not recall specifics. On direct by counsel for Local 100, Davis testified as follows:

Q. Have you had any conversations at all – are you aware of any conversations between you and Mr. Shuler as it relates to the union?

A. Yeah.

Q. Tell us about those conversations, if you remember.

A. That's a good one. I can't remember. I'm trying to think. We just had conversations about going to the union meeting, who people wanted to vote for, and that's about it that I can think of.

(Tr. at 99).

Then, after a series of leading questions from counsel for Local 100, Davis denied that she had any conversations with Shuler about Local 100 giving money to employees.

On cross examination, Davis testified that she actually had conversations with Shuler about Local 100 "every day" at their cubicles. Then, Davis testified inconsistently with her earlier statements on direct examination about payments Local 100 offered/ made to employees in exchange for their vote:

Q. You never had a conversation with Mr. Shuler... [about] younger associates getting paid less [by Local 100] because they were easier to get their vote?

A. No. **What I did say is that maybe the younger people don't care if they have a union or not because they live home with their mother, so a payment wouldn't bother them...**

(Tr. at 102)(emphasis added).

As Davis's above testimony reveals, while she initially testified on direct examination that the conversations with Shuler about Local 100 were limited to who was attending the union meetings and which way employees were going to vote, she later contradicted herself and testified that she in fact did discuss with Shuler the fact that younger associates were not as interested in Local 100 payments because those younger associates likely lived at home with their parents.

Once again, as was the case with Foster and Lennon, Davis provided internally inconsistent testimony regarding basic facts that go to the heart of GCS's objections. In light of Davis's inconsistent testimony regarding the essential facts at issue in GCS's objections, and consistent with the above-cited Board precedent, the Board should reverse the Hearing Officer's decision to credit Davis's testimony over that of Shuler.

(iv) Shuler's conversation with Ray

With respect to his conversation with Ray, Shuler as he had throughout the hearing, provided clear, consistent and detailed testimony. Shuler testified that a couple of days prior to the election, while riding the train to work, coworker Ray asked him if he "was down to get this money" with Local 100. (Tr. 34). Shuler once again responded that he was not interested (Tr. 33).

Unlike the other Local 100 witnesses, Ray did not initially deny speaking with or knowing who Shuler was. She admitted that she rides to and from work on the train with Shuler and that she has known him for a "long time." (Tr. 125, 126). However, when asked on direct examination by counsel for Local 100 whether they had discussed the union or the election on all the occasions she rode the train with him on the way to work, Ray responded emphatically "No". (Tr. 126).

On cross-examination, Ray was asked about this in more detail and provided blatantly inconsistent answers:

Q. So on these train rides and again leading up to the election, September 10 through 13... isn't it true that [the election] was a pretty important issue for the GCS associates, right?

A. Yes.

Q. And was that – that was something I would imagine you all talked about, correct?

A. Yes.

Q. And on the train... there was no conversation about the election or the unions on the train?

A. No, never.

(Tr. 133).

In addition to being inconsistent, Ray's testimony that in the days and weeks leading up to the election her conversations with Shuler "never" touched on the unions or the election is inherently improbable. This is especially so given Ray's admission that the election was an important issue for associates and was a frequent topic of conversation. For these reasons, the Board should reverse the Hearing Officer's decision to credit Ray's testimony over Shuler's.

(v) Shuler's conversation with Edwards

Finally, Shuler testified about his conversation with Edwards stating that shortly after the election, they spoke in the hallway at GCS and Edwards stated that she was "going to get her money" from Local 100 for voting for it. (Tr. at 35). Shuler simply responded that she should "do her thing." (Tr. at 35).

Edwards failed to appear at the hearing, despite having been issued a subpoena ad testificandum. Because Shuler's testimony concerning his conversation with Edwards is unrebutted the Board should draw an adverse inference that had she appeared her testimony would favor the Employer and corroborate Shuler's testimony that Edwards did in fact tell him

that Local 100 was paying her for voting for it.. See, e.g. *Carpenters Local 405*, 328 NLRB 788, 7878 fn. 1 (1999).

(vi) Conversation between Local 100 Representative Frank McCann and Leslie Foster

Shuler provided unrebutted testimony that prior to the election he was standing outside of the GCS having a cigarette when he overheard a conversation between Lennon and Local 100 Business Agent Frank McCann.² Shuler testified that he overheard McCann state to Lennon that whatever employees get now Local 100 will “get back later in a matter of months in dues.” Shuler testified that McCann further stated to Lennon that “**we’ll feed them** now and we’ll eat later”. Although Local 100’s Business Agent, Frank McCann, was present throughout the hearing, sitting next to counsel for Local 100, Local 100 failed to call him to rebut the testimony concerning McCann’s statements to Lennon.

The Board has long held that an adverse inference should be drawn when a party fails to call a witness who is reasonably assumed to be favorably disposed toward the party. See, e.g. *Torbitt & Castleman, Inc.*, 320 NLRB 907, 910 fn. 6 (1996) *aff’d* on point 123 F. 3d 899, 907 (6th Cir. 1997). The Board should thus draw an adverse inference here and find that McCann would have testified consistently with the testimony of Shuler about the conversation with Lennon.

B. The Unrebutted Testimony of Eric Shuler Establishes that Local 100’s Witnesses had apparent authority to speak on behalf of Local 100

The NLRA provides that “[i]n determining whether any person is acting as an ‘agent’ of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be

² Shuler identified McCann, who was sitting at the table next to counsel for Local 100 throughout the hearing. (Tr. 36).

controlling.” 29 U.S.C. § 152(13). In construing that statutory language, the Board applies common law agency principles to determine the existence of an agency relationship. *See, e.g., Tyson Fresh Meats, Inc.*, 343 NLRB 1335, 1336 (2004). An agency relationship may therefore exist between a purported agent and principal where the agent possesses either actual or apparent authority to act on the principal's behalf: “actual authority refers to the power of an agent to act on his principal's behalf when that power is created by the principal's manifestation to him. That manifestation may be either express or implied.” *Id.* (quoting *Communication Workers Local 9431 (Pacific Bell)*, 304 NLRB 446, n. 4 (1991)).

Apparent authority results from a “manifestation by the principal to a third party that creates a reasonable belief that the principal has authorized the alleged agent to perform the acts in question.” *Southern Bag Corp*, 315 NLRB 725 (1994). An employee’s statement may be attributed to the principal if the “employee is held out as a conduit for transmitting information from the [principal] to other employees.” *D & F Industries, Inc.*, 339 NLRB No. 73, slip op. at 1 (2003).

The Hearing Officer found that “there is insufficient evidence to establish that the employees who allegedly offered Shuler money had actual authority or apparent authority to act on behalf of Local 100. Specifically, the Hearing Officer stated:

...there is no record evidence that Local 100 authorized employees Davis, Lennon, Foster, or Ray to make any such pre-election promise/offer. Thus, it has not been established that these employees had actual authority to speak for Local 100 during the campaign period. Further, in the circumstances of this case, where the evidence indicates that there was a significant Local 100 presence during the organizing campaign and Davis, Lennon, Foster and Ray were not Local 100's only link to the unit employees, there is no manifestation by Local 100 to the unit employees that would create a reasonable basis for unit employees to believe Local 100 authorized Davis, Lennon, Foster or Ray to make the alleged promise/offer.

(Report at 15).

The Hearing Officer's findings are incorrect. Here, Shuler provided un rebutted testimony that he overheard a conversation between Lennon and Local 100 business agent McCann in front of the GCS facility during which McCann stated whatever employees get now "[we'll] get back later in a matter of months in dues." Shuler testified that McCann further stated to Lennon that "**we'll** feed **them** now and we'll eat later". McCann's use of the pronoun "we" is especially telling in his conversation with Lennon about Local 100 recouping the money it paid out for employees in just two months of dues collections. McCann brazenly made these statements to Lennon in front of GCS's building and in front of GCS employees, including Shuler. It is reasonable, therefore, for employees to also believe that Foster who approached him with Lennon in the breakroom to discuss Local 100 payments, was similarly vested with at least apparent authority to speak on behalf of Local 100. In light of Local 100's manifestations and the fact that Lennon, Foster and the other named employees all discussed Shuler the fact that Local 100 promised and actually paid employees for their votes and commitments to campaign on behalf of Local 100, the Board should reverse the Hearing Officer and find that apparent authority exists.

CONCLUSION

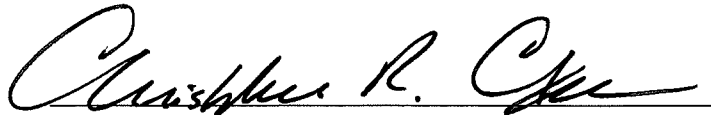
The Board will "set aside [an election] for improper conduct by a union or a union agent if threats, acts or coercion, or other improprieties occurred and 'materially affected the election results.'" *Id.* at 442 (citation omitted). The test, an objective one, is whether the union's conduct has the tendency to interfere with the employees' freedom of choice. See, *Harsco Corp.*, 336 NLRB 157, 158 (2001).

Given that the Hearing Officer's credibility findings are in error, and the fact that adverse inferences should be made regarding Local 100's failure to call witnesses assumed to be favorably disposed toward it, the Board should reverse the recommendations in the Report and direct that a second election be conducted.

Shuler's credible testimony paints a picture that is riddled with Local 100 representatives and its agents' misconduct that destroyed the required "laboratory conditions," and improperly influenced the outcome of the election. Where, as here, unions offer and/or provide employees a tangible economic benefit in the pre-election period those laboratory conditions necessary for a free and fair election are destroyed. See, e.g. *Freund Baking Co.*, 165 F. 3d 928, 931 (D.C. Cir. 1999); See also, *Flatbush Manor Care Center*, 287 NLRB 457 (1987) (where union payments of money to employees gave employees the impression that the payments would continue if the union was selected as their bargaining representative, which restrained and coerced employees in violation of the Act).

For all the reason discussed above, GCS requests that the Board reverse the Hearing Officer's recommendation to overrule Objections 1(a) and (b) and that the Region be ordered to conduct a second election.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Christopher R. Coxson", written over a horizontal line.


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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of employer's Exceptions To The Hearing Officer's Report On Objections has been served electronically via the Board's e-filing system and by electronic mail on the parties this 23rd day of December, 2014:

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